FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 23 1947
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 94

MEMPHIS NATURAL GAS COMPANY,
Petitioner,

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION OF MISSISSIPPI,
Respondent

ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT BY PETITIONER

EDWARD P. RUSSELL,
29th Floor Sterick Building,
Memphis, Tennessee,
Counsel for Petitioner.

B. L. TIGHE, JR.,
Standard Life Building,
Jackson, Mississippi;
CANADA, RUSSELL & TURNER,
29th Floor Sterick Building,
Memphis, Tennessee,
Of Counsel.

INDEX

Subject Index

	Page
Official report of the opinion by the Supreme Court of Mississippi	1
Jurisdiction	2
Statement of the case	2
Assignments of error	5
Brief and argument	6

Table of Cases and Authorities

Alpha Portland Cement Co. v. *Commonwealth of Massachusetts*, 268 U. S. 203	21
Cheney Brothers Co. v. *Massachusetts*, 246 U. S. 147	20
Cooney v. *Mountain States Tel. & Tel. Co.*, 294 U. S. 384	23
Crutcher v. *Kentucky*, 141 U. S. 47, 57	16
Dahnke-Walker Milling Company v. *Bondurant*, 275 U. S. 282	20
Freeman v. *Hewit*, 329 U. S. 249	10
General Trading Co. v. *State Tax Commission of Iowa*, 322 U. S. 335	24
Illinois Gas Co. v. *Public Service Co.*, 314 U. S. 498	19
Interstate Natural Gas Co. v. *A. H. Stone, Commissioner*, 308 U. S. 522	11
Joseph v. *Carter & Weekes Stevedoring Company*, 330 U. S. 422	15
Matson Navigation Co. v. *State Board*, 297 U. S. 441	23
Murdock v. *Pennsylvania*, 319 U. S. 105	18
Ozark Pipe Line Corporation v. *Monier*, 266 U. S. 555	17
Southern Natural Gas Corporation v. *Alabama*, 301 U. S. 148	13
Southern Pacific R. R. v. *Gallagher*, 306 U. S. 167	18
Spector Motor Service v. *McLaughlin*, 323 U. S. 101	8

Page

State Tax Commission v. *Memphis Natural Gas Co.*, 197 Miss. 583 (10/9/44), certiorari denied 323 U. S. 682 4
State Tax Commission v. *Gas Company*, 248 U. S. 41 19
A. H. Stone, Chairman, v. *Memphis Natural Gas Company*, — Miss. —, 26 So. 2d 268, February 24, 1947 1
Stone v. *Interstate Natural Gas Co.*, 103 F. 2d 544 (5 C.) 11

TABLE OF STATUTES, CONSTITUTIONS AND RULES CITED

Section 237(b), Judicial Code, 28 U. S. C. A., 344(b) 2
Supreme Court Rule 38, 5(a) 2
Chapter 121, 1934 Public Acts of Mississippi 7
Chapter 115, 1940 Public Acts of Mississippi 7
Commerce Clause of the United States Constitution, Article I, Section 8 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 94

MEMPHIS NATURAL GAS COMPANY,
Petitioner,

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION OF MISSISSIPPI,
Respondent

ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT BY PETITIONER

MAY IT PLEASE THE COURT:

The petitioner, Memphis Natural Gas Company, filed its petition for a writ of certiorari to review an adverse decision by the Supreme Court of Mississippi. The petition was granted June 16, 1947, — U. S. —, 67 Sup. Ct. 1736.

Official Report of the Opinion by the Supreme Court of Mississippi

A. H. Stone, Chairman, vs. Memphis Natural Gas Company, — Miss. —, 26 So. (2d) 268, February 24, 1947.

Jurisdiction

This Court has explicit authority to review by certiorari a final judgment in the highest court of a State

> "where is drawn in question . . . the validity of a statute of any State on the ground of its being repugnant to the Constitution . . . of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution . . ." 237 Judicial Code (b), 28 U. S. C. A., 344(b).

In this suit "a state court has decided a Federal question of substance . . . in a way probably not in accord with applicable decisions of this court." Supreme Court Rule 38, 5(a).

The Supreme Court of Mississippi decided that an undomesticated foreign corporation engaged in Mississippi exclusively in interstate commerce must pay Mississippi a tax for the privilege of engaging in such commerce. This violates the commerce clause of the Constitution.

The Federal question was presented to the State Tax Commission in the pleadings filed with the Commission (R. 5) and overruled. It was considered by the Circuit Court and sustained (R. 15). It was considered by the Supreme Court of Mississippi and overruled (R. 19).

The Supreme Court of Mississippi is the highest court of that State and the judgment entered against petitioner on February 24, 1947 is final (R. 22).

Statement of the Case

Petitioner was cited by the State Tax Commission of Mississippi to appear and show cause why it should not be required to pay the annual "franchise or excise" tax imposed by Chapter 121 of the 1934 Public Acts of Mississippi, page 204, as amended by Chapter 115 of the 1940 Public

Acts of Mississippi, page 105. The tax is $1.50 upon each $1,000.00 of capital used, invested or employed in Mississippi.

Petitioner filed with the State Tax Commission a comprehensive statement of the nature and scope of its business in Mississippi and alleged that the imposition of the tax violates constitutional immunities (R. 5). The Commission disagreed with petitioner and entered an order sustaining the tax liability (R. 4).

Petitioner appealed to the Circuit Court of the First Judicial District of Hinds County, Mississippi which reversed the Tax Commission and held petitioner not liable for the taxes as "petitioner is operating wholly and entirely in interstate commerce in the State of Mississippi, and not having qualified or domesticated, and seeking no franchise right or intrastate grant from the State" is not liable for such a tax (R. 16).

The Supreme Court of Mississippi reversed the Circuit Court and entered the final judgment in the approximate amount of $3,400.00 for each of the years 1942, 1943 and 1944 plus statutory interest at 1% per month (R. 22).

Petitioner is a Delaware corporation with general offices in Memphis, Tennessee. It owns and operates a pipe line extending from the gas fields in the vicinity of Monroe, Louisiana through the southeast corner of Arkansas, thence crosses the Mississippi River into Mississippi and extends north parallel with the Mississippi into Tennessee where the City of Memphis is its principal market. Map (R. 12).

A stipulation was made that all of the facts appearing in the petition filed by petitioner with the State Tax Commission are true (R. 13). The Supreme Court of Mississippi summarized in its opinion the undisputed facts.

> "Appellee, a Delaware corporation, owns and operates a natural gas pipe line running from the Monroe gas field in Louisiana to Memphis in the State of Ten-

nessee and beyond. The pipe line enters Mississippi at a point a few miles south of Greenville, and runs thence, in this State, towards the north in a general direction parallel with the Mississippi River, and enters Tennessee at a point almost directly south of Memphis. The map of the line, made a part of the record, shows that there are approximately 135 miles of it in this State, and that the system includes two compressing stations at points in this State.

"There is a stipulation in the record covering the further facts, and these are that appellee company is not, and has not been, engaged in any intrastate commerce in Mississippi, but that its business, so far as concerns this State, has been interstate solely and exclusively; that it has only one customer in the State, and to this customer it delivers gas wholesale, under a contract made in another state; that appellee company has not been domesticated or qualified as a foreign corporation with the right to do intrastate business; has no agent for service of process and has not had any such agent, and has maintained no office, in this State; and that it has no employees or representatives in this State other than those necessary to maintain the pipe line and its related facilities" (R. 19).

Petitioner pays to Mississippi *ad valorem* taxes amounting to approximately $82,000.00 a year (R. 14a) and also an income tax upon that part of its net income fairly attributable to activities in Mississippi.

State Tax Commission v. *Memphis Natural Gas Co.*, 197 Miss. 583 (10/9/44), certiorari denied 323 U. S. 682.

The Supreme Court of Mississippi held that:

"there is no attempt to tax interstate commerce as such"

which petitioner admits. The court then said that the petitioner is liable for the tax

"as a recompense for its protection of lawful activities carried on in this State by the corporation, foreign or domestic, activities which are incidental to the powers and privileges possessed by it by the nature of its organization—here the local activities in maintaining, keeping in repair, and otherwise manning the facilities of the system throughout the 135 miles of its line in this State."

In other words, the Supreme Court of Mississippi held that petitioner must pay a "franchise or excise" tax for the privilege of owning and maintaining in Mississippi facilities necessary to conduct an exclusively interstate business.

The Supreme Court of Mississippi justified its conclusion by resort to "trends" in judicial writing and, in substance, forecast that a long line of unbroken decisions of this Court are now to be ignored and heaved overboard. It cited no decisions of this Court to sustain its conclusions.

Admittedly petitioner is engaged in Mississippi solely in interstate commerce. It pays to Mississippi ad valorem and income taxes and thus contributes materially to the cost of local government. An undomesticated foreign corporation has the right to engage in Mississippi in interstate commerce without paying for the privilege as the privilege flows from the Commerce Clause of the Federal Constitution and may not be directly burdened by the imposition of a local "franchise or excise tax."

Assignment of Errors

I

The Supreme Court of Mississippi erred in holding that Mississippi can exact a franchise tax from an undomesticated foreign corporation for the privilege of doing solely interstate business because the imposition of the tax vio-

lates the Commerce Clause of the United States Constitution, Article I, Section 8.

II

The Supreme Court of Mississippi further erred in holding that petitioner's activities "in maintaining, keeping in repair, and otherwise in manning the facilities of the system" for interstate commerce are local activities which enable Mississippi to exact a privilege tax.

III

The Supreme Court of Mississippi further erred in basing its decision on a "trend" of the times and thus ignoring a long line of decisions of this Court that a state may not exact a tax for the privilege of carrying on interstate commerce.

IV.

The Supreme Court of Mississippi further erred in holding that it is permissible to exact this privilege tax from interstate commerce because a similar tax is exacted by Mississippi from its domestic corporations.

Brief and Argument

To a limited extent it has become the fashion for state courts to indulge in judicial prophecies, "trends" and forecasts by jumping at unwarranted legal conclusions and ignoring principles decided by this Court in long and unbroken lines of decisions. The Supreme Court of Mississippi cited not a single decision of this Court to justify its opinion as none are available. It stated that "more recently there has been a pronounced trend" to burden interstate commerce by "a tax as a recompense for the local protection afforded" if the effect is not "to interfere with the national interests." It further stated that the collection of this tax from petitioner is justified for protec-

tion of "the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State."

This Court has repeatedly stated that such interstate properties may be burdened with ad valorem taxes, income taxes upon that part of the net income reasonably attributable to activities within the taxing State, and a proper part of the costs of enforcing police regulations. This Court has never said, however, that the States may go further and exact a toll for the right to use the facilities in interstate commerce.

Chapter 121 of the 1934 Public Acts of Mississippi, p. 204 as amended by Chapter 115 of the 1940 Public Acts of Mississippi, p. 105, imposes the "franchise or excise tax" upon both domestic and foreign corporations in such manner that there is no discrimination against foreign corporations. The only question involved is whether or not the tax violates the Commerce Clause.

The Act defines "doing business":

> "When the term 'doing business' is used in this Act, it shall mean and include each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization, whether the form of existence be corporate, associate, joint stock company or common law trust."
>
> . . . . . .
>
> "Tax on Foreign Corporations. For the year 1940 and annually thereafter, there shall be and is hereby imposed, levied and assessed upon every corporation, association or joint stock company, as hereinbefore defined, organized and existing under and by virtue of the laws of some other state, territory or country, or organized and existing without any specific statutory authority, now, or hereinafter doing business within

this state, as hereinbefore defined, a franchise or excise tax equal to $1.50 of each $1,000.00 or fraction thereof of the value of capital used, invested or employed within this state, except as hereinafter provided. It being the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the state."

There are several recent decisions of this Court plainly manifesting the purpose of this Court to adhere to the principle that a state cannot tax the privilege of engaging in interstate commerce.

The invalidity of the tax can be demonstrated by reference to innumerable decisions of this Court. The Supreme Court of Mississippi made no mention of any of them though many of the leading cases on the subject were cited and discussed in petitioner's brief in the Supreme Court of Mississippi.

The great importance of the question here involved is emphasized in a recent decision of this Court.

Spector Motor Service v. *McLaughlin*, 323 U. S. 101.

Connecticut imposed on business within the state "a tax or excise upon its franchise for the privilege of carrying on or doing business within the state . . ."

This court said:

"* * * Petitioner, a Missouri corporation with its principal place of business in Illinois, is engaged exclusively in the interstate trucking business. It is neither authorized by Connecticut to do intrastate trucking nor in fact does it engage in it. It maintains two leased terminals in Connecticut solely for the purpose of carrying on its interstate business. At the request of its lessor, it has filed with the Secretary of State in Connecticut a certificate of its incorporation

in Missouri, has designated an agent in Connecticut for service of process, and has paid the statutory fee."

The State Tax Commissioner decided that there was liability for the tax, and thereupon the taxpayer sought an injunction in the United States District Court, alleging that the tax offends provisions of the Commerce and Due Process Clauses of the United States Constitution.

This Court said:

"The District Court construed the statute to be 'a tax upon the exercise of a franchise to carry on intrastate commerce in the state' and therefore not applicable to the petitioner."

The Circuit Court of Appeals for the Second Circuit construed the statute to reach all corporations, whether engaged in intrastate or interstate commerce.

This Court said:

"* * *. It was conceded below that if the Connecticut tax was construed to cover petitioner it would run afoul the Commerce Clause, were this Court to adhere to what Judge Learned Hand called 'an unbroken line of decisions.' On the basis of what it deemed foreshadowing 'trends', the majority ventured the prophecy that this Court would change its course, and accordingly sustained the tax. In view of the far-reaching import of such a disposition by the Circuit Court of Appeals we brought the case here. 322 U. S. 720, 64 S. Ct. 1155.

"Once doubts purely local to the Constitution and laws of Connecticut are resolved against the petitioner there are at stake in this case questions of moment touching the taxing powers of the States and their relation to the overriding national interests embodied in the Commerce Clause. * * *

This Court further said:

"* * *. If Connecticut in fact sought to tax the right to engage in interstate commerce, a long course

of constitutional history and 'an unbroken line of decisions' would indeed be brought into question."

"* * *. But even if the statute hits aspects of an exclusively interstate business, it is for Connecticut to decide from what aspect of interstate business she seeks an exaction. It is for her to say what is the subject matter which she has sought to tax and what is the calculus of the tax she seeks. Every one of these questions must be answered before we reach the constitutional issues which divided the court below."

The Circuit Court of Appeals was reversed and the suit remanded to the District Court with directions that the litigation be held "in the federal courts until definite determinations on local law are made by the state courts * * *."

The import of the decision plainly is that lower courts are not to be encouraged to guess and speculate about possible trends in the Supreme Court of the United States by departing from "an unbroken line of decisions" and sustaining a franchise tax for the privilege of doing exclusively interstate commerce, as such a tax violates "an unbroken line of decisions."

The attention of the Supreme Court of Mississippi was directed to

Freeman v. *Hewit*, 329 U. S. 249

in which this Court said:

"A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between states. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables."

* * * * * * *

"It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. *But it cannot aim to control that trade even though it desires to control its own.* It cannot justify what amounts to a levy upon the very process of commerce across State lines by pointing to a similar hobble on its local trade. It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to the extent that it removes the temptation to sell the goods locally. But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce."

. . . . . .

"Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a State may be allowed one single taxworth of direct interference with the free flow of commerce. An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce."

To offset the foregoing the only Federal case cited by the Supreme Court of Mississippi is:

Stone v. *Interstate Natural Gas Co.*, 103 F. 2d 544 (5 C.).

It was affirmed in

Interstate Natural Gas Co. v. *A. H. Stone, Commissioner*, 308 U. S. 522.

The entry was:

> "December 11, 1939. Per curiam. The judgment is affirmed. Southern Natural Gas Corporation *v.* State of Alabama, 301 U. S. 148."

The Supreme Court of Mississippi took the position that *Interstate Natural Gas Co.* v. *Stone* authorizes imposition of the tax upon petitioner, but such reasoning is erroneous. The suit involved this same Mississippi franchise statute. Interstate, also a natural gas pipe line extending from Louisiana to and through Mississippi, was held liable for the tax because, as emphasized in the opinion:

> "As a foreign corporation it filed with the Secretary of State under other statutes as a prerequisite to doing business in Mississippi a copy of its charter, and paid a required fee of $500, and appointed an agent for service of process."

The Court said the effect of doing these things is that:

> "When this Gas Company, though it did not domesticate, filed its charter and appointed its agent for service in order to qualify for doing business in the old sense, it began the enjoyment in Mississippi of a privilege incident to its corporate organization, it began to 'do business' in the new and artificial sense."

If a corporation elects to enter a State and seek a local privilege, it must pay therefor and cannot avoid the tax on the ground that the greater part of its business is interstate. The election to either do or seek the privilege of doing a very trifling amount of local business is adequate to sustain the privilege tax.

In this case of *Stone* v. *Interstate Natural Gas Company* the court has above twice emphasized the effect of the foreign corporation filing its charter, appointing a process agent and paying $500.00 for the privilege of local business.

To be certain that the reader clearly understands the basis for the decision, the court tells the reader a third time about the effect of filing the charter and naming an agent for service of process. The court said:

> "By the Legislature's queer definition, a foreign corporation formed for profit is doing business in Mississippi and is taxable as soon as it gets ready to be active by having property there and enjoying the protection of the State for it, and qualifies formally by filing its charter and naming its agent for process service. *These latter acts clearly mark its appearance in the State.*"

The court reemphasizes the controlling point for a fourth time:

> "The charter which the Gas Company filed and obtained the right to enjoy in Mississippi grants to it power to do much more than to engage in the interstate transportation of gas and oil."

In its simplest form, Interstate was liable for the tax because it chose to file in Mississippi its charter and thereby secured the right to do a local business.

This Court refused certiorari in the *Interstate* case on the strength of the following case in which the foreign pipe line corporation also qualified to do intrastate business:

> *Southern Natural Gas Corporation v. Alabama*, 301 U. S. 148.

Mr. Chief Justice Hughes stated:

> "Appellant was organized prior to May 12, 1928, under the laws of Delaware and on that date it qualified to do business in Alabama. It named a statutory agent and filed in the office of the Secretary of State a copy of its charter which covers a wide range of activities. It has paid annually the required permit fee. At the

time of the assessment in question appellant maintained its office and chief place of business in the city of Birmingham, Ala. The entire management, control, and conduct of its business was conducted from that office."

* * * * * * * * *

"By compliance with the statute appellant obtained the privilege of engaging within the State in any of the activities which its charter authorized."

* * * * * * * * *

"From the agreed facts we are unable to conclude that the business thus conducted in Alabama was entirely an interstate business. While the gas which appellant sold was brought into the State from Louisiana, it appears that appellant carried on in Alabama activities of an intrastate character."

In addition to the foregoing activities, this Court pointed out that Southern Natural Gas Corporation actually distributed gas in Alabama which is intrastate business. It necessarily follows for a number of reasons that it was liable for the franchise taxes. It is obvious that *Stone* v. *Interstate Natural Gas Co.*, affirmed on the strength of *Southern Natural Gas Corporation* v. *Alabama*, was correctly decided because, as stated in *Stone* v. *Interstate Natural Gas Co.*, the pipe line corporation qualified in Mississippi

"formally by filing its charter and naming its agent for service of process. These latter acts clearly mark its appearance in the State."

Petitioner, Memphis Natural Gas Company, has not done these things and the decision is therefore not applicable to it and has been erroneously applied.

Another very recent case sustaining the principle that a tax may not be exacted for the privilege of doing interstate business is:

Joseph v. *Carter & Weekes Stevedoring Company*, 330 U. S. 422.

The City of New York imposed an excise tax measured by gross receipts for the privilege of carrying on business in the city. The taxpayer was engaged exclusively in stevedoring business, which this court found to be exclusively interstate and therefore held the tax uncollectible as an unconstitutional burden on interstate commerce.

This court pointed out that the taxpayer contributed materially to the cost of local government by payment of "the general income and ad valorem taxes of the State and City of New York."

> " • • •. As the power lies in Congress under the Clause to make any desired adjustment in the taxation area, its acquiescence in our former rulings on state taxation indicates its agreement with the adjustments of the competing interests of commerce and necessary state revenues. There is another reason that may be the basis for the acceptance, almost complete, by Congress of the judicial interpretations in this field. This is that a wide latitude exists for permissible state taxation. This term, in an effort to show that the reach of the Circuit Court (commerce clause?) did not destroy the state's power to make commerce pay its way, we elaborated the fact that taxes on the commerce itself was not the sole source of state revenue from that commerce. Freeman *v.* Hewit, supra, p. 5; see also Adams Mfg. Co. *v.* Storen, supra, 310." (Our parenthetical insertion).

When discussing the several types of lawful taxation available to the states, this court said:

> "• • •. When we examine the Berwind-White tax on the purchasers of tangible personal property

for consumption, there is the same reliance upon the local character of the sale, 309 U. S. at pages 43, 47, 49, 58, 60 S. Ct. at pages 390, 392, 393, 394, 398, 84 L. Ed. 565, 128 A. L. R. 876. We there said, 309 U. S. at page 48, 60 S. Ct. at page 393, 84 L. Ed. 565, 128 A. L. R. 876:

"'Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or *impose a levy for the privilege of doing it,* or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey.'" (Our emphasis).

Crutcher v. *Kentucky,* 141 U. S. 47, 57.

The court said:

"To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject. • • • We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

In other words, Mississippi grants no privilege to a corporation engaged exclusively in interstate commerce because the privilege flows from the Federal Government. The State has no control over such a privilege and is

therefore unable to lawfully tax it. A very different situation results where such a foreign corporation seeks the privilege of doing intrastate business by filing its charter, appointing an agent for service of process or doing some other similar act indicating the desire to have the privilege of local business. When a foreign corporation engaged not only in interstate commerce but also having sought the privilege of local business resists liability for a privilege tax, the courts uniformly hold that such foreign corporation is liable because it sought and had the right to do a local business. Such is the decision in *Stone* v. *Interstate Natural Gas Co., supra.*

Ozark Pipe Line Corporation v. *Monier*, 266 U. S. 555.

This case is precisely in point. The pipe line company was a Maryland corporation. It operated a pipe line from Oklahoma through Missouri to Illinois. It maintained in Missouri two general offices. Missouri attempted to collect a franchise tax. The court held that the tax could not be sustained as the pipe line company was engaged in Missouri in nothing but interstate commerce. The court said:

> "The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the state, were all exclusively in furtherance of its interstate business, and the property itself, however extensive, or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business. The protection against imposition of burdens upon interstate commerce is practical and substantial and ex-

tends to whatever is necessary to the complete enjoyment of the right protected. Heyman *v.* Hays, supra, page 186 (35 S. Ct. 403)."

In the following comparatively recent case the doctrine stated in Ozark Pipe Line Corporation, *supra*, was approved without the slightest reservation.

Southern Pacific R. R. v. *Gallagher*, 306 U. S. 167.

On page 179 the court said when speaking of *Ozark Pipe Line Corporation* v. *Monier:*

"The tax was forbidden because on the privilege of *doing an exclusively interstate business.*"

On page 180 the court said:

"The language just quoted shows that this court interpreted the transactions in Missouri as merely a part of the interstate commerce and *the tax on the franchise* an interference therewith *because a tax directly upon it.* '• • • nothing was done in Missouri except in furthrance of transportation.' It was this conclusion of the court on the factual situation which brought about the Ozark decision. Where there is also intrastate activity, an apportioned State franchise tax on foreign corporations doing an interstate business is upheld. Southern Natural Gas Corp. *v.* Ala., 301 U. S. 148 155. A franchise tax on an exclusively interstate business is a direct burden; proportioned to an intermingled business, it is valid. Atlantic Lumber Co. *v.* Commissioner, 298 U. S. 553, 556."

The foregoing states and positively admonishes that some intrastate business must be done before the State can demand a privilege tax from a foreign corporation doing interstate business.

Murdock v. *Pennsylvania*, 319 U. S. 105.

"A state may not impose a charge for the enjoyment of a right granted by the federal constitution.

Thus it may not exact a license tax for the privilege of carrying on interstate commerce (McGoldrick *v.* Berwind-White, 309 U. S. 33, 56-58), although it may tax the property used in, or the income derived from that commerce so long as those taxes are not discriminatory."

Illinois Gas Co. v. *Public Service Co.*, 314 U. S. 498.

The court said:

"In applying this mechanical test for determining when interstate commerce ends and intrastate commerce begins this Court has held that the interstate transportation and the sale of gas at wholesale to local distributing companies is not subject to state control of rates, Missouri *v.* Kansas Gas Co., *supra;* see Public Utilities Commission *v.* Landon, *supra*, 245; cf. Public Utilities Commission *v.* Attleboro Co., 273 U. S. 83, 89, or to a state privilege tax, State Tax Commission *v.* Gas Company, *supra.*"

The case cited in the last line, supra, originated in Mississippi.

State Tax Commission v. *Gas Company*, 248 U. S. 41.

The Gas Company operated a pipe line extending from the gas field in Louisiana into Mississippi, where it sold gas at wholesale to several distributing companies. Mississippi attempted to exact a privilege tax. The court said:

"Distributing companies tap the plaintiff's pipes near Natchez in the town of Woodville. The gas withdrawn by the distributors is measured by a thermometer and a meter furnished by the plaintiff, which is the only way in which it can be measured. The pressure of the gas is reduced by the plaintiff before it passes into the purchaser's hands. The work done by the plaintiff is done upon the flowing gas to help deliver it and seems to us plainly to be incident to the interstate commerce between Louisiana and Mississippi. The

plaintiff simply transports the gas and delivers it wholesale not otherwise worked over than to make it ready for delivery to the independent parties that dispose of it by retail. Mo. *v.* Kan. Gas Co., 265 U. S. 298, Public Utilities Comm. *v.* Landon, 249 U. S. 236, 245, Ozark Pipe Line Corp. *v.* Monier, 266 U. S. 555."

The court decided that the Mississippi privilege tax could not be collected.

Dahnke-Walker Milling Company v. *Bondurant*, 275 U. S. 282.

"A corporation of one state may go into another without obtaining the leave or license of the latter for all the legitimate purposes of interstate commerce, and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause of the Federal Constitution.

"The commerce clause of the Constitution expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter.

"Thus it was said in Welton *v.* Missouri; 91 U. S. 275, 280, 23 L. Ed. 347, 349; 'Commerce' is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities."

"For these reasons we are of opinion that the transaction was a part of interstate commerce, in which the plaintiff lawfully could engage without any permission from the state of Kentucky, and that the statute in question, which concededly imposed burdensome conditions, was, as to that transaction, invalid because repugnant to the commerce clause."

Cheney Brother Co. v. *Massachusetts*, 246 U. S. 147.

A Massachusetts statute imposed an annual excise tax on every foreign corporation doing business within the State

of 1/50 of 1% of the par value of the authorized capital stock.

The corporation had an office in Massachusetts with salesmen who solicited orders subject to acceptance by the home office in Connecticut. It was held that the corporation was not subject to the tax. The court said:

> "The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are among the means by which that business is carried on and share its immunity from State taxation."

The court also said:

> "We think the tax on this company was essentially a tax on doing an interstate business and therefore repugnant to the Commerce Clause."
>
> *Alpha Portland Cement Co.* v. *Commonwealth of Massachusetts*, 268 U. S. 203.

Massachusetts levied an excise tax:

> "Every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of * * * two and one half (2½%) per cent of that part of its net income * * * which it derived from business carried on within the commonwealth."

The taxpayer was incorporated in New Jersey, but it maintained an office in Boston.

> "in charge of a district sales manager, with a clerk, where its correspondence and other natural business activities in connection with the receipt of orders and shipments of goods for the New England states are conducted. The office is used as headquarters for traveling salesmen, who solicit orders in Massachusetts and the other New England states."

Orders taken were sent to the principal office of the taxpayer located in Pennsylvania, and the cement was shipped from factories which were located outside of Massachusetts.

The court said on page 211:

> "It is rightly conceded by the Attorney General that the petitioner was engaged in this commonwealth exclusively in interstate commerce."

Also:

> "The right to lay taxes on taxable property or on income is not involved; and the inquiry comes to this: May a state impose upon a foreign corporation which transacts only interstate business within her borders an excise tax measured by a combination of those factors—the proportion of the value of capital shares attributed to transactions therein, and the proportion of net income attributed to such transactions?
>
> "Cheney Bros. Co. *v.* Mass., 246 U. S. 147, 153, 154, necessitates a negative reply. Under St. 1909, c. 490, Part III, Par. 56, the State demanded an excise of a foreign corporation which transacted therein only interstate business. The excise was laid upon the corporation and the basis of it the same as in the present cause. This court said: 'We think the tax on this company was essentially a tax on doing an interstate business and therefore repugnant to the commerce clause.' Here also the excise was demanded on account of interstate business. A new method for measuring the tax had been prescribed, but that cannot save the exaction. Any such excise burdens interstate commerce and is therefore invalid without regard to measure or amount. Looney *v.* Crane, 245 U. S. 178, 190; International Paper Co. *v.* Mass., 246 U. S. 135, 142; Heisler *v.* Thomas Colliery Co., 260 U. S. 245, 249; Texas Transport & Terminal Co. *v.* New Orleans, 264 U. S. 150."

The court also said on page 219:

"The excise challenged by plaintiff in error is not materially different from the one declared unconstitutional in Cheney Bros. Co. *v.* Mass., and cannot be enforced against a foreign corporation which does nothing but interstate business within the state. The introduction of an extremely complicated method for calculating the amount of the exaction does not change its nature or mitigate the burden."

Cooney v. *Mountain States Tel. & Tel. Co.*, 294 U. S. 384.

Plaintiff, a Colorado corporation operating a statewide telephone system in Montana, contested the Montana act imposing a license tax on all telephone instruments used in the state. As the telephones were used for both intra and interstate purposes, the court held that the privilege tax being indivisible and indiscriminate in its application "necessarily burdens interstate commerce," and said:

"But a state cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it."

* * * * * * *

"* * * Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business. Sprout *v.* South Bend, Inc., 277 U. S. 163, 171, 48 S. Ct. 502, 72 L. Ed. 833, 62 A. L. R. 45; *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470, 51 S. Ct. 499, 75 L. Ed. 1171."

Matson Navigation Co. v. *State Board*, 297 U. S. 441.

California imposed a franchise tax upon every corporation exercising its corporate franchises within the State. The tax was measured by net income. The statute provided that if all the corporation's business was done in California, the tax would be computed on the entire net income; if not, on that portion derived from business attributable to activities in California.

The State assessed a tax of 4% on the entire net income from intrastate business and also a like tax on that part of the net income from interstate and foreign commerce attributable to California. The corporation was incorporated under the laws of California. The court held that the corporation was liable for the tax upon its entire intrastate business and also upon that part of the net income from interstate business fairly attributable to California. While the court held that the tax, as applied to the corporation to the extent stated, was valid, the court made this very interesting statement:

> "A foreign corporation whose sole business in California is foreign and interstate commerce cannot be subjected to the tax in question. Alpha Cement Co. *v.* Massachusetts, 268 U. S. 203; Anglo-Chilean Nitrate Co. *v.* Alabama, 288 U. S. 218."
>
> *General Trading Co.* v. *State Tax Commission of Iowa*, 322 U. S. 335.

> "* * * Of course, no State can tax the privilege of doing interstate business. See Western Live Stock *v.* Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823, 115 A.L.R. 944. That is within the protection of the Commerce Clause and subject to the power of Congress."

We respectfully submit that the Supreme Court of Mississippi has gravely erred and that Mississippi cannot law-

fully exact from petitioner a tax for the privilege of engaging exclusively in interstate commerce.

Respectfully submitted,

EDWARD P. RUSSELL,
29th Floor, Stetick Building,
Memphis, Tennessee,
Counsel for Petitioner.

(2915)